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# Immunity as an Integral Aspect of Tribal Sovereignty: An analysis of the Supreme Court Case *Michigan v. Bay Mills Indian Community*

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## Abstract

While Native nations in the United States have tribal sovereignty—that is, the inherent freedom and authority to govern themselves without outside control—non-Native actors have often challenged this institution within legal and political spaces. The United States court system, starting with the Marshall Court, has often attempted to define aspects of Indigenous sovereignty and federal-tribal relationships. The 2014 US Supreme Court case *Michigan v. Bay Mills Indian Community* is no exception, raising questions of sovereign immunity in the context of Indian gaming, tribal-state relationships, and land trusts. This paper first provides a general context for the case, identifying relevant historical events and legal precedents. Next, the paper illustrates the case facts and rulings and traces its journey to the highest court in the United States. Finally, it analyzes the contemporary significance of the rulings for the federal Indian law landscape and future cases, specifically noting the majority opinion’s limiting conditions.

## I. INTRODUCTION

Tribal sovereignty is one of the oldest and most important institutions for Indigenous nations and peoples.<sup>1</sup> Emphasizing this, former Quinault Indian Nation President Joseph Burton DeLaCruz Jr declared that “no right is more sacred to a nation, to a people, than the right to freely determine its social, economic, political and cultural future without external interference.”<sup>2</sup> His words echo those of countless Native American tribal government leaders and communities across Indian Country who consider sovereignty and self-authority as defining aspects of their identities.

As essential as this institution is for Native people, non-Native groups often seek to challenge its power by

bringing legal cases into state and federal court systems; as a result, the United States Supreme Court has come to establish the metes and bounds of sovereignty for Native nations throughout the country. Through the 2014 case of *Michigan v. Bay Mills Indian Community* case, the Supreme Court affirmed tribal sovereignty by upholding sovereign immunity based on a narrow reading of the Indian Gaming Regulatory Act. However, it is important to note the Court’s limiting conditions and the impact of these conditions on sovereign immunity and federal Indian law as a whole.

<sup>1</sup> Murray Lee, “What is Tribal Sovereignty?” (Partnership With Native Americans 2014).

<sup>2</sup> John Caldbick, “DeLaCruz, Joseph ‘Joe’ Burton (1937-2000)” (The Free Encyclopedia of Washington State History 2011).

## II. LEGAL AND HISTORICAL CONTEXT

United States legal institutions, especially the Supreme Court, have attempted to erode tribal sovereignty for centuries. Walter Echo-Hawk states: “American law has often worked against Native Americans, legitimizing the appropriation of their property and the decline of their political, human, and cultural rights as indigenous peoples.”<sup>3</sup> His argument is exemplified by a series of Indian law rulings passed down from the Marshall Court in the first half of the nineteenth century. In the 1823 case of *Johnson v. M’Intosh*, Justice John Marshall and other justices of the Supreme Court conferred second-class property rights to Native nations by ruling that the right of possession of their traditional lands could be taken away with the “discovery of Indian country by Pilgrims or other lucky Europeans”<sup>4</sup> and was subject to possible dispossession by the federal government. Seven years later, in the *Cherokee Nation v. Georgia* case, Marshall denied the categorization of Native American tribes as self-sufficient and external foreign nations. Instead, he denominated tribes as “domestic dependent nations,” a title which decreased their rightful political status and legally codified their subjugation by state and federal governments.<sup>5</sup> Under Justice Marshall, the United States Supreme Court cemented clear attacks on tribal sovereignty into federal Indian law that live on today.

The American government’s efforts to incapacitate Native American communities came to a head during the latter half of the twentieth century with the introduction and 1953 passage of House Concurrent Resolution 108 (HCR 108), a congressional policy known colloquially as termination. As the culmination of centuries of assimilation and oppression tactics,

termination policy called for the “end of reservations and federal services and protections to be completed ‘as rapidly as possible.’”<sup>6</sup> The policy identified all tribes in California, Florida, New York, and Texas, as well as five other large tribes, for near-immediate termination and developed an action plan for the termination of the remaining tribes over the next few years.<sup>7</sup>

During these years, the federal government again abandoned its responsibilities to support Native nations and uphold treaty rights. Native Americans could not seek health and education services from the government, build homes on their reservations, or remain exempt from state and federal taxes.<sup>8</sup> HCR 108 signified the federal government’s final push toward the full erasure of Native authority, and the victims of termination “found themselves... suffering a painful psychological loss of community, homeland, and self-identity.”<sup>9</sup>

Self-determined Native leaders and activists successfully fought back against termination and reclaimed tribal sovereignty by working through the channels of the federal government. For example, Ada Deer, along with the Determination of Rights and Unity for Menominee Shareholders (DRUMS) and other members of the previously-terminated Menominee Indian Tribe of Wisconsin, advanced through the federal legislative system and secured the passage of the Menominee Restoration Act by lobbying congressional leaders, retaining experts as advisers during the creation of the Act, and taking advantage of changing political attitudes at the

<sup>3</sup> Walter Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Fulcrum Publishing 2010), 15.

<sup>4</sup> *Ibid.*, 83.

<sup>5</sup> *Ibid.*, 112.

<sup>6</sup> Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (W.W. Norton and Company 2005), 57.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, 84.

<sup>9</sup> *Ibid.*, 81.

time.<sup>10</sup> When President Nixon signed the Menominee Restoration Act in December 1973, he returned tribal lands back to Menominee citizens and affirmed the Menominee Indian Tribe's status as a self-governing, sovereign nation. This restoration was not unique; various other pieces of Native-related legislation during this time, such as the Alaska Native Claims Settlement Act of 1971,<sup>11</sup> reinstated the land, resources, and authority of Indigenous peoples in the United States.

The Indian Gaming Regulatory Act (IGRA) represents another important legislative win in the movement to regain tribal sovereignty and sits at the heart of the *Michigan v. Bay Mills Indian Community* case. Although Native nations were largely successful in winning their lands and right to self-governance back, they initially faced a lack of robust financial resources.<sup>12</sup> In an effort to raise revenue and ensure economic stability, many tribes began to develop and operate gaming institutions in the late 1970s and early 1980s.<sup>13</sup> However, rising debates over jurisdiction and competition with non-Native gaming operations culminated in a 1987 Supreme Court case.

In *California v. Cabazon Band of Mission Indians*, the Supreme Court ruled that tribal self-governance outweighed state interests and that local and state governments had no authority to regulate gaming on tribal lands.<sup>14</sup> In response, Congress constructed a legislative framework and set of acceptable practices for on-reservation Indian gaming. Passed in 1988, the Indian Gaming Regulatory Act created a national commission and a three-class structure to dictate the roles of

tribal, state, and federal governments.<sup>15</sup> Under the act, tribal governments can independently regulate Class I gaming, but they must jointly regulate gaming with the National Indian Gaming Commission for Class II gaming and must negotiate a compact with state governments for Class III gaming.

The Indian Gaming Regulatory Act appeals to both tribal nations and the states in which they reside. It provides states with the power to negotiate aspects of Indian gaming and have an active voice in conversations about gaming practices. The act also empowers tribal communities by codifying full-scale casino gaming abilities and encouraging government-to-government relationships between tribes and states. Additionally, by specifically highlighting tribal authority to sue states for failing to negotiate a compact in good faith,<sup>16</sup> the act holds states accountable to working with tribes in a just and meaningful way.

In the decades since Congress passed the Indian Gaming Regulatory Act, many tribes have been able to considerably improve the quality of life for tribal citizens who live on reservations: in a few short years, income rates grew, unemployment decreased, and on-reservation housing, education, and health services increased in quality.<sup>17</sup> In essence, the Indian Gaming Regulatory Act has provided an economic arena in which Native nations can build economic, political, and cultural capacity.

Additionally, the application of the principle of sovereign immunity—the idea that a sovereign nation cannot commit a legal wrong and cannot be sued without its consent<sup>18</sup>—for use in Indian legal cases became more

<sup>10</sup> Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (W.W. Norton and Company 2005), 189.

<sup>11</sup> “Alaska Native Claims Settlement Act Land Claims” (The Great State of Alaska 2014).

<sup>12</sup> Randall K. Q. Akee et al., “The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development” (Journal of Economic Perspectives 2015), 189.

<sup>13</sup> *Ibid.*, 191.

<sup>14</sup> “California v. Cabazon Band of Mission Indians” (Oyez).

<sup>15</sup> Randall K. Q. Akee et al., “The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development” (Journal of Economic Perspectives 2015), 192.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, 186.

<sup>18</sup> “Sovereign Immunity Law and Legal Definition” (US Legal 1997).

prevalent with the 1998 Supreme Court case of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* In a 6-3 opinion delivered by Justice Anthony M. Kennedy, the Court held that Native nations “enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.”<sup>19</sup> This ruling affirmed that sovereign immunity does apply to Native American nations, signifying a clear affirmation of tribal sovereignty.

### III. MICHIGAN v. BAY MILLS INDIAN COMMUNITY

*Michigan v. Bay Mills Indian Community* deals with questions of Indian gaming, sovereign immunity, and above all, tribal authority. Situated in the northeast of Michigan’s Upper Peninsula, the Bay Mills Indian Community is one of twelve federally-recognized tribes in Michigan and is a founding member of the Inter-Tribal Council of Michigan, a consortium of Michigan’s federally-recognized tribes.<sup>20</sup> Like many other tribal nations, the Bay Mills Indian Community entered the casino and gaming industry to employ tribal members and local residents, raise revenue, and achieve greater fiscal independence from the United States government. On July 4th, 1984, the tribe opened Kings Club Casino on the reservation, the first “legal” Indian gaming operation in United States history.<sup>21</sup>

After making a considerable financial profit off of the Kings Club Casino in the decades after its opening, the Bay

Mills Indian Community decided to expand its gaming enterprise with the development of another Class III gaming casino. As detailed in the Michigan Indian Land Claims Settlement Act of 1997, Congress allocated a trust fund for Ottawa and Chippewa Indians in Michigan for the recovery and improvement of tribal lands, stating that “any land acquired with funds from the Land Trust shall be held as Indian lands are held.”<sup>22</sup>

Using funds from this trust, the Bay Mills Indian Community bought a tract of land one hundred miles away from the reservation in Vanderbilt, Michigan in August 2010 and opened the Bay Mills Vanderbilt Casino on November 3rd, 2010.<sup>23</sup> A month later, the state of Michigan sued the Bay Mills Indian Community for closure of the casino, arguing that the Tribe violated the Indian Gaming Regulatory Act’s state-tribal compact law for Class III gaming because the Vanderbilt Casino was not located on “Indian lands.”<sup>24</sup> The Little Traverse Bay Bands of Odawa Indians, likely concerned about economic competition, filed a separate lawsuit a day later with the same allegations.<sup>25</sup> Soon after, however, the National Indian Gaming Commission declared that the Vanderbilt Casino was not located on lands “within the meaning of the IGRA.”<sup>26</sup>

The case first appeared before the United States District Court for the Western District of Michigan. The district court ruled against the tribe, placing a preliminary injunction on gaming activity at the Vanderbilt Casino and ordering the Bay Mills Indian Community to permanently close it down, but the Bay Mills Indian Community appealed

<sup>19</sup> “*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*” (Oyez).

<sup>20</sup> “Bay Mills Indian Community” (Inter-Tribal Council of Michigan, Inc. 2012).

<sup>21</sup> “Kings Club Casino” (Bay Mills Resort and Casinos 2019).

<sup>22</sup> “Michigan Indian Land Claims Settlement Act” (United States Congress 1997).

<sup>23</sup> Christine L. Swanick et al., “U.S. Supreme Court Decision in *Michigan v. Bay Mills Indian Community et al.*” (The National Law Review 2014), 1.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> Katherine Hinderlie et al., “*Michigan v. Bay Mills Indian Community*” (Cornell Law School Legal Information Institute).

this decision to the Court of Appeals for the Sixth Circuit.<sup>27</sup> In a decision that reversed that of the federal district court, the Sixth Circuit found that neither Michigan nor the Little Traverse Bay Bands of Odawa Indians could sue under the Indian Gaming Regulatory Act:

The Sixth Circuit reasoned that IGRA would provide a basis for the suit only if the Vanderbilt casino were on Indian lands, which Michigan argued it was not. Even if the Vanderbilt casino were on Indian lands, as the Tribe argued it was, the suit could not proceed because the Sixth Circuit could not redress the harm.<sup>28</sup>

Furthermore, the Sixth Circuit ruled that the state of Michigan could only sue if the Bay Mills Indian Community waived its sovereign immunity. The state of Michigan then filed a petition for a writ of certiorari with the United States Supreme Court.<sup>29</sup>

The case of *Michigan v. Bay Mills Indian Community* asked the Supreme Court to review two questions:

- 1) Does a federal court have jurisdiction over activity that violates the IGRA but takes place outside of Indian lands?
- 2) In such a case, does tribal sovereign immunity prevent a state from suing a tribe in federal court?<sup>30</sup>

During the oral arguments held in December 2013, Michigan claimed that the federal courts had jurisdiction over the Tribe's gaming activity because the authorization and licensing of the Vanderbilt Casino occurred on the reservation, thus satisfying the "on Indian lands" aspect and allowing for federal jurisdiction.<sup>31</sup> The state also contended that Bay Mills did not have sovereign immunity in the case because the Indian Gaming Regulatory Act meant to enable states to "enforce state law in federal court against tribes that engaged

in unlawful off-reservation gaming."<sup>32</sup> Arguing further against the sovereign immunity question, Michigan claimed that the Vanderbilt Casino was not situated on Indian lands and, therefore, not immune to lawsuits in federal court.<sup>33</sup>

The Bay Mills Indian Community responded to the state of Michigan's arguments with impassioned dissent. Taking into account the fact that the gaming act defines Class III gaming activities as only gaming activities and not gaming-related topics such as licensing and authorization, the tribe argued that the Indian Gaming Regulatory Act did not grant the court jurisdiction over the off-reservation Vanderbilt Casino.<sup>34</sup> Speaking to the question of immunity, Bay Mills listed the two exceptions to the rule of sovereign immunity established by the Supreme Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*—that a tribe can waive its sovereign immunity or Congress can abrogate a tribe's sovereign immunity—claiming that without the employment of either exception in this case, sovereign immunity remained intact. Furthermore, citing *Kiowa* again, the tribe recalled that the Supreme Court had already rejected the limitations on sovereign immunity that the state of Michigan called for.

In the Opinion of the Court, delivered by Justice Elena Kagan and based on a 5-4 majority, the Supreme Court supported the Sixth Circuit's decision of Bay Mills's sovereign immunity with a narrow interpretation of the Indian Gaming Regulatory Act. Kagan writes: "Among the core aspects of sovereignty that that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit

<sup>27</sup> "Michigan v. Bay Mills Indian Community" (Oyez).

<sup>28</sup> Christine L. Swanick et al., "U.S. Supreme Court Decision in Michigan v. Bay Mills Indian Community et al." (The National Law Review 2014), 1.

<sup>29</sup> Ibid., 2.

<sup>30</sup> "Michigan v. Bay Mills Indian Community" (Oyez).

<sup>31</sup> Katherine Hinderlie et al., "Michigan v. Bay Mills Indian Community" (Cornell Law School Legal Information Institute).

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.



traditionally enjoyed by sovereign powers.”<sup>35</sup> Because the Indian Gaming Regulatory Act exclusively deals with gaming on Indian lands, and Michigan had ironically maintained that the Vanderbilt Casino was not on Indian lands, the Court ruled that the Indian Gaming Regulatory Act did not give the court jurisdiction over the Casino’s gaming activity.<sup>36</sup> Drawing on *Kiowa*, the Court additionally held that sovereign immunity prevented Michigan from suing the Tribe without an abrogation by Congress or the Tribe itself.<sup>37</sup> In her concurrence, Justice Sonia Sotomayor noted that a lack of sovereign immunity in commercial matters would potentially discourage Native nations from pursuing economic opportunities and working toward the end of reliance on federal funding.<sup>38</sup> Overall, through *Michigan v. Bay Mills Indian Community*, the Court upheld the institution of tribal sovereign immunity as an integral aspect of tribal sovereignty.

#### IV. CASE SIGNIFICANCE

The Supreme Court’s decision in *Michigan v. Bay Mills Indian Community* stands as a largely positive ruling for tribal sovereignty in the United States. The Court clearly recognized the common law doctrine of sovereign immunity for off-reservation commercial activity as a Native American right; in doing so, the Court acknowledged and affirmed the overarching institutions of tribal sovereignty and self-governance that Indigenous nations have defended for centuries. Additionally, this ruling signifies the ability of Native nations to defend their economic efforts and enterprises

against attack from other authorities, ultimately highlighting opportunities to employ sovereign immunity for protecting tribal interests in state and federal courts.

But although the *Michigan v. Bay Mills Indian Community* ruling emphasizes the immunity of tribal nations in gaming-related cases, the Court’s limiting conditions prescribed in footnote eight of the majority opinion create a judicial loophole that endangers sovereign immunity in other legal cases. The footnote reads as follows:

We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a “special justification” for abandoning precedent is not before us.<sup>39</sup>

This brief but significant addition to the Court’s main ruling removes the doctrine of sovereign immunity when non-Native entities sue Native organizations, individuals, officials, employees, and even patrons in non-gaming cases—in other words, this footnote “all but invited lower courts to make an exception.”<sup>40</sup>

The Alabama Supreme Court was the first to “exploit the opening created in the Bay Mills case.”<sup>41</sup> In the 2017 case of *Wilkes v. PCI Gaming Authority*, plaintiffs Casey Wilkes and Alexander Russell sued the Poarch Band of Creek Indians Gaming Authority for injury compensation after a car accident with casino employee Barbie Spraggins.<sup>42</sup> The Alabama Supreme Court dismissed the application of sovereign immunity in the case, citing the Bay Mills footnote:

<sup>35</sup> “Michigan v. Bay Mills Indian Community et al.” (Supreme Court 2014).

<sup>36</sup> “Michigan v. Bay Mills Indian Community” (Oyez).

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> “Michigan v. Bay Mills Indian Community” (Supreme Court 2014).

<sup>40</sup> Brian L. Pierson, “Alabama Supreme Court blows a hole through tribal sovereign immunity armor” (Godfrey and Kahn 2017).

<sup>41</sup> Ibid.

<sup>42</sup> “Wilkes v. PCI Gaming Authority” (Justia Law 2017).

In light of the fact that the Supreme Court of the United States has expressly acknowledged that it has never applied tribal sovereign immunity in a situation such as this, we decline to extend the doctrine beyond the circumstances to which that Court itself has applied it... We ... hold that the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members.<sup>43</sup>

As evidenced by the *Wilkes* case, the small “opening” created by the Supreme Court in footnote eight of the *Michigan v. Bay Mills Indian Community* decision leaves room for lower courts to weaken the expression of sovereign immunity—and tribal sovereignty—in many types of Indian-related law cases. Other cases such as *Jamestown S’Kallam Tribe v. McFarland*, *Harrison v. PCI Gaming Authority*, and *Rosas v. AMG Services* followed the lead of *Wilkes* in restricting the use of tribal sovereign immunity.<sup>44</sup>

Most recently, this long-running debate between Bay Mills Indian Community and the state of Michigan was revisited in the subsequent 2019 case *Bay Mills Indian Community v. Whitmer*.<sup>45</sup> However, the Sixth Circuit Court of Appeals vacated<sup>46</sup> the previous ruling in which a judge sided with the state of Michigan, again affirming the Bay Mills Indian Community’s right to assert sovereignty and claim rightful space in the gaming industry.

## V. CONCLUSION

In the introduction of *In the Courts of the Conqueror: The 10 Worst Indian Cases Ever Decided*, Walter Echo-Hawk declares:

Only rarely in US history has the law served as a shield to *protect* Native Americans from abuse and to further their aspirations as indigenous peoples. The law has more often been employed as a sword to *harm* Native peoples by stripping away their human rights, appropriating their property, stamping out their cultures, and, finally, to provide legal justification for federal policies that have, at times, resorted to genocide and ethnocide.<sup>47</sup>

Upon a close analysis of this case, we can understand that *Michigan v. Bay Mills Indian Community* stands as a moment in which the Supreme Court served as *both* a shield for and a sword against Native nations across the United States. Moving away from destructive past rulings that damaged Indian authority, the Supreme Court reinforced sovereignty and immunity in *Michigan*; at the same time, the Court’s incorporation of footnote eight poses a major potential threat to the same principles that it aimed to encourage. Ultimately, *Michigan v. Bay Mills Indian Community* allows us to recognize that tribal sovereignty as expressed through sovereign immunity is stronger than ever before but still not permanently cemented in the Supreme Court’s federal Indian law landscape.

<sup>43</sup> Brian L. Pierson, “Alabama Supreme Court blows a hole through tribal sovereign immunity armor” (Godfrey and Kahn 2017).

<sup>44</sup> Ibid.

<sup>45</sup> “Bay Mills Indian Community v. Whitmer” (United States Court of Appeals for the Sixth Circuit 2019).

<sup>46</sup> Erased from the record

<sup>47</sup> Walter Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Fulcrum Publishing 2010), 16.



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